No. 83-1732

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

BETTY C. PHILLIPS,
Petitioner

v.

T.V.A. ENGINEERING ASSOCIATION, INC., VERNON DRAKE, JAMES EICKMAN, KEN SMITH, KATHY WATSON, and PATRICIA LYON (CURETON),
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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July 10, 1984

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. §636(c)(1) and (3) violate Article III of the United States Constitution by authorizing entry of final judgments and direct review in the Courts of Appeals upon consent of the parties by United States Magistrates.

2. Whether a writ of certiorari should be granted to reexamine factual findings which were concurred in by the Magistrate and the Court of Appeals.

3. Whether the alleged incompetence of Petitioner's counsel in this civil case is a basis for overturning the Court's finding that discrimination did not exist.

4. Whether the constitutionality of 28 U.S.C. §636(c) and/or the alleged coercion of consent to refer the case to the Magistrate can be raised for the first time in a Petition for Writ of Certiorari to this Court.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTII CIRCUIT

The Respondents file this Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner in this cause seeking a review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 5, 1983.

OPINION BELOW

The unreported opinion of the Court of Appeals appears in Appendix A to the Petition for Writ of Certiorari filed by the Petitioner herein. The Opinions of the Magistrate appear in Appendix B-3 and B-4 of the Petition for Writ of Certiorari filed by the Petitioner herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All constitutional provisions, statutes, regulations, and rules are set forth in Appendix C to the Petition for Writ of Certiorari or in Appendix D to this Brief.

STATEMENT OF THE CASE

Petitioner, Betty Phillips, was hired on June 7, 1979, by the Respondent T.V.A. Engineering Association, Inc. (hereinafter "TVAEA"), a labor organization representing employees of the Tennessee Valley Authority. She was terminated in June, 1981. (Magistrate's Memorandum Opinion at Appendix B-4, page A-16 of the Petition for Writ of Certiorari filed by the Petitioner herein, hereinafter referenced as "App. B-4 at p. "; Opinion of the United States Court of Appeals for the Sixth Circuit contained in Appendix A of the Petition for Writ of Certiorari at page A-2, hereinafter referenced "App. A at p. "). Ms. Phillips had satisfactory work evaluations through December, 1980, though she did have some problems with interpersonal relations during that time (App. A at p. A-2).

Beginning in February 1981, Ms. Phillips began to have serious problems with interpersonal relations in the work environment (App. A at p. A-2). The record is clear that on many occasions Ms. Phillips openly or impliedly threatened lawsuits against her supervisor and persons with whom she worked (App. A at p. A-2 and App. B-4 at p. A-19). Further, Ms. Phillips deliberately refused to speak to some members of the TVAEA staff with whom she worked. This resulted in tension in the office (App. A at p. A 2, A-3 and App. B-4 at p. A-20).

In March, 1981 the Executive Committee of TVAEA held a meeting and directed Ms. Phillips' supervisor to remedy problems that had been created within the TVAEA office by Ms. Phillips (App. A at p. A-2 and A-3). The Executive Director and Supervisor, Mr.

Eickman and Vernon Drake, President of TVAEA, held a meeting with Ms. Phillips in March, 1981 for the purpose of warning her that further threats against members of TVAEA and/or her supervisor could result in her termination (App. A at p. A-3 and App. B-4 at p. A-19). Ms. Phillips refused to accept the criticisms of her superiors, used foul language and swore at her supervisor, and continued to threaten to sue her supervisor if he disciplined her in any way (App. A at p. A-3 and App. B-4 at p. A-19). Between March 16, 1981 and May 15, 1981 Mr. Eickman continued to meet with Ms. Phillips to try to correct her misconduct and she continued to deny blame for the office tensions and continued to threaten her supervisor (App. A at p. A 3 and App. B-4 at p. A-19). Because Ms. Phillips' conduct was not improving and because her misconduct was adversely impacting the TVAEA office, Mr. Eickman recommended Ms. Phillips termination at an Executive Committee meeting held on May 15, 1981. At that time he presented a report concerning Ms. Phillips' misconduct (App. A at p. A-3 and App. B-4 at p. A-21).

The Executive Committee invited Ms. Phillips to address the May 15 meeting concerning her proposed termination. She first presented general grievances regarding her work situation and complaints regarding her supervisor. At the end of her presentation, she charged that Mr. Eickman had harassed her sexually by holding money out to her, standing very close to her, and saying in a seductive voice "would you like to make a little extra money?" (App. A at p. A-3 and App. B-4 at p. A-19 thru A-21).

Because of Ms. Phillips' charges of sexual harassment, the Executive Committee determined not to act upon her proposed termination and a committee was appointed to investigate her charges (App. A at p. A-3 and App. B-4 at p. A-21). The committee investigated the charges by speaking with each and every TVAEA employee regarding the office situation generally and spe-

cifically with regard to any sexual harassment. The committee found that there was no evidence of sexual harassment and reported back to the Executive Committee at its meeting of June 25, 1981 (App. A at p. A-3, A-4 and App. B-4 at p. A-21).

After receiving the committee's report that there was no evidence of sexual harassment and that there was clear and abundant evidence of misconduct on Ms. Phillips part, the Executive Committee then acted upon the original proposal for termination of Ms. Phillips and voted to terminate Ms. Phillips on the basis of her misconduct (App. A at p. A-4 and App. B-4 at p. A-21).

Ms. Phillips subsequently brought suit against TVAEA and the individual Defendants under Title VII of the Civil Rights Act of 1964 for sexual harassment and unlawful retaliation. The Magistrate determined that no sexual harassment existed and found for the Defendants. In addition, The Magistrate found that Ms. Phillips' accusations of sexual harassment were lacking in credibility and were fabricated for the sole purpose of preventing the termination of her employment (App. A at p. A-4 and App. B-4 at p. A-16, A-18, and A-19).

In drawing the conclusion that there was no validity to Ms. Phillips charges, the trial court and the Court of Appeals indicated that it was not consistent with Ms. Phillips personality or training to suffer sexual harassment for a long period of time without complaining to persons who could have remedied the situation and also discussed three specific instances where Ms. Phillips testimony concerning the sexual harassment was disproved. First, Ms. Phillips claimed to have told three people from the TVAEA Executive Committee about her sexual harassment problems in March of 1981. These three persons testified and denied having heard any complaints concerning sexual harassment until the meeting of May 15, 1981 where Ms. Phillips' termination was recommended (App. B-4 at p. A-18).

At an informal discussion concerning sexual harassment which occurred on November 26, 1980 (after ten months in which Ms. Phillips allegedly was being subjected to sexually suggestive offers of money), Ms. Phillips told the group that she had never been sexually harassed; that women who are harassed asked for it; and that, in her opinion, no virtuous woman would be sexually harassed (App. A at p. A-4, A-5 and App. B-4 at p. A-18). In connection with this finding, each Court observed that Ms. Phillips is a lawyer and a sophisticated, outspoken person capable of protecting herself. Further, that it was unlikely that she would have made this comment if sexual harassment existed (App. A at p. A-5 and App. B-4 at p. A-18).

Finally, although Ms. Phillips claimed that another co-worker had been harassed sexually, the co-worker emphatically denied it and she also denied any knowledge of Ms. Phillips having been sexually harassed (App. A at p. A-3).

The trial court and the appellate court found that Ms. Phillips fabricated the sexual harassment charge at the May 15 meeting of the TVAEA Executive Committee for the sole purpose of blocking an effort to terminate her employment and that Ms. Phillips was experiencing significant interpersonal difficulties at TVAEA which justified her termination (App. B-4 at p. A-19 thru A-22 and App. A at p. A-5).

REASONS FOR NOT GRANTING THE WRIT

This case does not meet the guidelines of Rule 17 of the Supreme Court of the United States Revised Rules and is not an appropriate case for consideration by this Court. Rule 17 requires special and important reasons for this Court to exercise its discretion to grant a writ of certiorari. A careful analysis of the reasons advanced by the Petitioner for granting certiorari in this case requires the conclusion that the Petitioner's primary complaints

are (1) that she cannot accept the findings of fact concurred in by the Magistrate and the Court of Appeals and (2) she is dissatisfied with judgments made by her attorney during the course of the litigation of this case. These are not reasons which would normally convince this Court to grant a writ of certiorari.

The only issues raised by the Petitioner which are not of the nature set forth above relate to the constitutionality of the reference to the United States Magistrate under 28 U.S.C. §636(c). As noted in the Petitioner's own brief, Article III challenges in the United States Courts of Appeals have met with a uniform lack of success. The decisions which have been rendered by the Courts of Appeals are not in conflict with each other nor with applicable decisions of this Court and do not require review by this Court.

Each of the six reasons relied upon by the Petitioner as being appropriate for granting the writ of certiorari in this case will be responded to in more detail below.

1. Reference To A United States Magistrate For Entry Of Final Judgment And Direct Review In The United States Court Of Appeals Upon Consent Of The Parties, In Accordance With 28 U.S.C. §636(c)(1) And (3), Does Not Violate Article III Of The United States Constitution.

The constitutionality of a consensual reference of a case to a Magistrate under the provisions of 28 U.S.C. §636(c) has recently been examined by several of the United States Courts of Appeals. Each of the circuits considering the question have found 28 U.S.C. §636(c) to satisfy the requirement of separation of powers embodied in the United States Constitution. *Goldstein vs. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Pacemaker Diagnostic Clinic of America, Inc. vs. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984); *Williams vs. Mussomelli*, 722 F.2d 1130 (3rd Cir. 1983); *Wharton-Thomas vs. United States of America*, 721 F.2d 922 (3rd Cir. 1983). The

analysis of the constitutional issue by the various Courts addressed the constitutionality of 28 U.S.C. §636(c) as it relates to individual litigants and as it relates to the public's interest in having an independent judiciary.

In examining whether individual litigants may waive their rights under Article III, the Courts of Appeals considering the question have held that the parties consent to try a matter before a Magistrate is a consent to a specific form of trial within the district court and not a consent to grant subject matter jurisdiction to a court otherwise without jurisdiction. *See, Pacemaker Diagnostic Clinic of America, Inc. vs. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984); and *Wharton-Thomas vs. United States of America*, 721 F.2d 922 (3rd Cir. 1983). The protections afforded individual litigants by Article III can, therefore, be waived. *Goldstein vs. Kelleher*, 728 F.2d 32 (1st Cir. 1984); *Pacemaker Diagnosic Clinic of America, Inc. vs. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984); *Wharton-Thomas vs. United States of America*, 721 F.2d 922 (3rd Cir. 1983).

The Courts of Appeals examined situations in which comparable consensual references have been upheld by this Court. The Courts considered the cases of *Kimberly vs. Arms*, 129 U.S. 512 (1889) and *Heckers vs. Fowler*, 69 U.S. (2 Wall.) 123 (1864). In *Heckers vs. Fowler* the parties had agreed to refer the case to a referee and agreed that the report of the referee would "have the same force and effect as a judgment of the court." Prior to the referee making a decision the trial court ordered that the clerk enter a judgment in conformity with the report upon its filing. The Supreme Court held that the reference was valid, reasoning that the reference "does not directly involve the question of jurisdiction, but has respect to the mode of trial as substituting the report of the referee for the verdict of the jury. . . ." *Id.* at 128.

The *Pacemaker* Court also considered cases where the Supreme Court has allowed criminal defendants to

waive fundamental rights and concluded that it would be inconsistent to forbid the waiver in a civil case of the right to a trial before an Article III Judge. *Pacemaker Diagnostic Clinic of America, Inc. vs. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984), also see the following cases cited in *Pacemaker Diagnostic Clinic of America vs. Instromedix, Inc.*: *Garner vs. United States*, 424 U.S. 648 (1976), [the right to be free from self incrimination]; *Adams vs. United States ex rel. McCann*, 317 U.S. 269 (1942), [the right to counsel]; *Schneckloth vs. Bustamonte*, 412 U.S. 218 (1973) [the right to be free from unreasonable searches and seizures]; *Barker vs. Wingo*, 407 U.S. 514 (1972) [the right to a speedy trial]; *Duncan vs. Louisiana*, 391 U.S. 145 (1968) [the right to a jury trial].

Since the Courts of Appeals considering the question have held that this is not a question of subject matter jurisdiction, but a question of the right of the parties to consent to a particular form of trial within a court having jurisdiction, the question arises as to whether the Petitioner in this case can raise the issue of the constitutionality of 28 U.S.C. §636(c) in this Court. The constitutionality of the statute was not raised in either the District Court or the Sixth Circuit Court of Appeals by the Petitioner and, not being a question of subject matter jurisdiction, the Petitioner is now barred from raising this issue in the United States Supreme Court. *Delta Air Lines, Inc. vs. August*, 450 U.S. 346 (1981); *Dothard vs. Rawlinson*, 433 U.S. 321 (1977).

In analyzing 28 U.S.C. §636(c) as a part of a constitutional system of government, the Courts of Appeals relied upon the following factors in determining that the separation of powers doctrine is not violated: (1) Article III Judges determine the number of Magistrate positions for each district. 28 U.S.C. §636(b). (2) Appointment of Magistrates and removal of Magistrates is the responsibility of Article III Judges. 28 U.S.C. §631. (3) Article III Judges retain the power to cancel the reference of an in-

dividual case to a Magistrate. 28 U.S.C. §636. (4) The district court retains the power to adjudge a party in contempt. 28 U.S.C. §636. (5) The clerk of the district court manages the records in cases referred to the Magistrate. (6) The Magistrate is not independent of the district court, but subject to its supervision and control. (7) The parties may have the judgment of the Magistrate reviewed as a matter of right by the district court and/or the appropriate Court of Appeals. The method of review is left to the parties. 28 U.S.C. §636.

There is no impermissible exercise of authority over the judicial system by either of the other branches of government as a result of the Magistrates' Act. In fact, the Magistrates are under the control of district court judges. The Magistrates are free from outside influences.

The Courts of Appeals considering the issue of the constitutionality of the consensual reference provisions of the Magistrates' Act have rendered decisions which are in conformity with prior decisions of this Court and have uniformly held the provision to be constitutional. A review of that issue by this Court is therefore unnecessary.

2. The Reference In This Case Was Not Coerced.

The Petitioner argues that the reference of the case to the Magistrate under 28 U.S.C. §636(c) was coerced. Petitioner also complains that she "was neither consulted nor advised in advance of the fact that her trial counsel had waived her right to seek review from the Magistrate's judgment to the District Court." *See*, Petition for Writ of Certiorari, page 9.

The "coercion" complained of by the Petitioner arises out of a discussion at pretrial conference as to whether this was an appropriate case for referral to the Magistrate. Excerpts of the discussion which occurred at the pretrial conference are contained in Appendix B-1

to the Petition for a Writ of Certiorari filed by the Petitioner herein. At the conclusion of a discussion as to whether the parties would consent to the referral to the Magistrate, the Court indicated that the Court would refer the matter to the Magistrate. The Court did not state the basis for the referral, but presumably the referral would have been pursuant to 28 U.S.C. §636(b)(2).

An Order of Referral was not entered in this case because the parties, through counsel, informed the Clerk of the Court that the parties had discussed the matter further after the pretrial conference and that they *might* consent to a reference to the Magistrate. Accordingly, the Clerk advised that he would inform the District Judge that the parties desired that he withhold entry of an Order of Reference until the matter could be further considered by the parties.

Had the parties not discussed the matter further and not consented to the referral pursuant to 28 U.S.C. §636(c), a reference would have been made by the Court pursuant to the provisions of 28 U.S.C. §636(b)(2). Thereafter the Master would have been required to conduct the proceedings and file a report with the Court including findings of fact. The parties would have been given ten days within which to file written objections to the report and the District Court would have had the power to modify, adopt, or reject the report in whole or in part and, if necessary, receive further evidence or take other necessary action. Rule 53, Federal Rules of Civil Procedure.

The constitutionality of a reference under 28 U.S.C. §636(b)(2) has been impliedly upheld by this Court. *See, United States vs. Raddatz*, 447 U.S. 667, rehearing denied 448 U.S. 916 (1980).

The fact that the Court was prepared to refer the matter under recognized and acceptable court procedures cannot be deemed to be coercive. The parties would have been free to accept the reference by the

Court had it actually been made or would have been free to object to the reference.

Subsequent to the pretrial conference the parties' attorneys discussed the matter of the reference further and each agreed to take the matter up with their clients. Subsequently, a consent to a reference under the provisions of 28 U.S.C. §636 was entered and the parties determined that the appeal should lie directly to the Sixth Circuit rather than the District Court. Although the Petitioner asserts in her brief that her trial counsel did not "read the waiver form with care" and that he "was surprised on learning that he had waived review in the District Court," (*See* Petition for Writ of Certiorari, page 9) this is simply not the case. Petitioner's trial counsel expressly discussed the matter of appeal from the Magistrate's decision with counsel for the Respondents herein and was fully aware that the appeal was to be made directly to the Sixth Circuit.

An examination of the consent form filed with the Court and contained in Appendix B-2 to the Petition for Writ of Certiorari filed by the Petitioner herein would defy the conclusion that an attorney could have waived the right of appeal to the District Court unknowingly. The consent form used by the United States District Court for the Eastern District of Tennessee is a one page form and the provision with respect to election to take an appeal to the District Judge requires the reading of only two sentences.

The parties in this proceeding did not have to consent to the trial before the Magistrate. The consent form was not filed with the Court until April 5, 1982, twelve days after the pretrial conference. (*See* Docket Sheet and Appendix B-1 of the Petition for Writ of Certiorari filed by Petitioner herein.) Had the parties simply left things as they stood at the conclusion of the pretrial conference, an Order of Reference would have been entered by the District Judge pursuant to 28 U.S.C. 636(b)(2) and

this matter would have been tried by the Magistrate and reviewed by the District Judge in accordance with those provisions. Instead, the parties considered the matter further and made an election to proceed under the provisions of 28 U.S.C. §636(c).

The question of the voluntariness of the consent to trial before the Magistrate is being raised for the first time in this Court. No objection was made at the trial level or in the United States Court of Appeals for the Sixth Circuit. The Petitioner's failure to make a timely objection of the referral to the Magistrate constitutes a waiver and this issue cannot be raised for the first time in this Court. *Delta Air Lines, Inc. vs. August*, 450 U.S. 346 (1981); *Dothard vs. Rawlinson*, 433 U.S. 321 (1977); *also see*, *Hill vs. Duriron Company, Inc.*, 656 F.2d 1208 (6th Cir. 1981); *Avery Products Corporation vs. Morgan Adhesives Company*, 496 F.2d 254 (6th Cir. 1974).

3. The Decision Below Affirming An Award Of Attorney Fees Against Petitioner Does Not Conflict With Decisions Of This Court Or Of Other Courts Of Appeals.

The Petitioner asserts that the Sixth Circuit should not have affirmed the Magistrate's award of attorney fees because the Petitioner's claim was not "frivolous, unreasonable, or without foundation" as required by *Christianburg Garment Company vs. E.E.O.C.*, 434 U.S. 410 (1978). An examination of the opinions of the Magistrate and the Court of Appeals reflects that the standard set forth in *Christianburg Garment Company vs. E.E.O.C.*, was, in fact, the standard applied in this case. In the Magistrate's Opinion, filed on October 7, 1982 and contained in Appendix B-4 to the Petition for Writ of Certiorari filed by the Petitioner herein, the Court held as follows:

> In the instant action, the defendants moved for an award of attorney's fees and costs pursuant to 42

> U.S.C. 2000e-5 (k). This provision of the Civil Rights Act allows the Court the discretion to award reasonable attorney's fees upon a finding that the Plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Christianburg Garment Company vs. E.E.O.C.*, 434 U.S. 412, 422, 98 S. Ct. 694, 700 (1978). The undersigned is of the opinion that the instant action is one of those rare cases in which the prevailing defendants are entitled to such an award.

The Opinion of the United States Court of Appeals for the Sixth Circuit entered on December 5, 1983 made the following findings and conclusions of law with respect to the award of attorney fees.

> . . . The case was heard before a magistrate who found for the defendant. In addition, he awarded defendants attorney's fees on the basis of *Christianburg Garment Company vs. E.E.O.C.*, 434 U.S. 412, 422 (1978), which allows attorney's fees to defendants in Title VII cases when the plaintiff's action was frivolous, unreasonable, or without foundation. The magistrate found that "Mrs. Phillips' accusations of sexual harassment are lacking in credibility and wholly unfounded." He suggested that she "fabricated the sexual harassment charge at the May 15, 1981 meeting of the TVAEA Executive Committee for the sole purpose of blocking an action on Mr. Eickman's part to terminate her employment." . . . . With respect to the award of attorney's fees to defendants, *Christianburg* does authorize such an award in Title VII cases when the plaintiff's suit is groundless, as the magistrate found Ms. Phillips' suit to be. In light of the entire record it appears that this finding as well was not clearly erroneous.
>
> The Courts obviously applied the proper standard

for determining whether attorney fees should be awarded in this case. The Petitioner's complaint is, therefore, that she does not agree with the factual determinations of the Magistrate which were concurred in by the Court of Appeals. The practice of this Court has been to not accept matters for review where a factual determination is in issue and that determination has been concurred in by the two lower courts. *Branti vs. Finkel*, 445 U.S. 507 (1980); *United States vs. Ceccolini*, 435 U.S. 268 (1978).

The Petitioner raises two other points with respect to attorney fees. First, she complains that neither the Magistrate nor the Court of Appeals considered the financial impact of an award of fees. Although the Petitioner was given an opportunity to respond to the Petition for Attorney Fees filed by the Defendants and did so respond, her response contained no financial information nor did it urge the Court to consider the financial impact. (*See* Appendix E to this Brief.)

The Petitioner also relies upon cases holding that an award of fees should not be made against the Petitioner when the Petitioner has been advised by competent counsel that a lawsuit is appropriate. Assuming that the cases cited by the Petitioner require that standard to be used, that standard should not be applied in this case. As set forth in the opinions filed by the Magistrate and the Court of Appeals, *Ms. Phillips fabricated her sexual harassment claim.* Her motive in accusing her supervisor of sexual harassment was to prevent her dismissal. The policy of allowing attorney fees to be assessed should not be thwarted by allowing a person to hide behind her attorney's recommendation when that recommendation is based upon deliberate falsehoods told him by the client.

4. The Sixth Circuit Did Not Err In Failing To Reverse As Clearly Erroneous Findings By The Magistrate That (1) No Sexual Harassment Existed; (2) Retaliation Was Not A Factor In Petitioner's Dismissal; And (3) The Peti-

tioner Would Have Been Discharged In The Absence Of Her Protected Conduct.

Without arguing the facts of this case, the Respondents assert that the Petitioner's forth and fifth reasons for granting the Petition for Writ of Certiorari in this case do not justify the granting of a writ. The captions of those sections of the Petition clearly indicate that a challenge is being made to fact findings which were concurred in by the Magistrate and the Court of Appeals. The settled practice of this Court, in the absence of most exceptional circumstances, is to decline to review cases on the basis of factual findings which have been concurred in by the two lower courts. *Branti vs. Finkel*, 445 U.S. 507 (1980); *United States vs. Ceccolini*, 435 U.S. 268 (1978).

5. The Trial Of This Case Has Not Been Characterized By Plain Errors That Seriously Affect The Fairness And Integrity Of Public Proceedings And Do Not Call For Exceptional Review By The Court.

The Petitioner in Section 6 of her Petition for Writ of Certiorari complains primarily about decisions made by her trial lawyer during the conduct of the litigation in this case. She complains that her "inexperienced trial counsel critically prejudiced her case . . ." Although not conceding that the Petitioner's trial counsel was inexperienced or that he committed errors with respect to the conduct of the case, the Respondents assert that this is not an appropriate consideration for the United States Supreme Court. A lawyer must be able to determine questions of strategy and will not be second guessed by the courts on his determinations as to who to call as a witness, when to raise an objection, or other decisions made during the course of a trial. *Thomas vs. Zant*, 697 F.2d 977 (11th Cir. 1983); *U.S. vs. Nolan*, 571 F.2d 528 (10th Cir. 1978); *Coco vs. U.S.*, 569 F.2d 367 (5th Cir. 1978); *Perrignon vs. Bergen Brunswig Corporation*, 77

F.R.D. 455 (D.C. Cal. 1978); *Davison vs. State of Oklahoma*, 428 F. Supp. 34 (D.C. Okla. 1976). It must also be recognized that the Petitioner is a skilled attorney who was deeply involved in the preparation of her case.

There is no constitutional or statutory right to effective assistance of counsel in a civil discrimination case. *Watson vs. Moss*, 619 F.2d 775 (8th Cir. 1980).

The Petitioner's primary complaint with respect to her trial counsel was that he did not properly authenticate certain tapes of meetings of TVAEA, Inc. where Petitioner's dismissal was discussed. She indicates that the tapes offer very strong corroborating evidence of discrimination and/or retaliatory dismissal. In doing so, she has taken specific quotes from a transcript which was not introduced as evidence at the trial.

Although the "Warwick" transcription *is not proper evidence and is not before this Court*, Petitioner did have an opportunity to cross examine witnesses at the trial about statements made at the meetings and used her transcription of those meetings in the course of the case. Respondents had their own transcription of the tapes which differed in some respects from the Petitioner's transcription and these were also utilized by the attorneys during the course of the case.

The portions of the tape which are considered critical by the Petitioner were in fact pointed out to the Court during the course of the trial and witnesses were cross examined about these statements. Although the tapes themselves were not introduced, the language which is considered critical by the Petitioner was before the Court and was considered by the Court. *See* Transcript of Proceedings, pages 596-600, 316-317, 576-581, 194. These portions of the evidence were considered by the Court along with over 700 additional pages of testimony and the explanations given with respect to the language at issue. Again, the Magistrate considered all of the evidence and made strong factual findings against the Peti-

tioner. These findings were concurred in by the Court of Appeals.

CONCLUSION

For these reasons, a writ of certiorari should not be granted to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of this Brief in Opposition to Petition for Writ of Certiorari have been served on counsel for Petitioner, Frederic S. LeClerq, 2806 Kingston Pike, Knoxville, Tennessee 37919.

Done this 10th day of July, 1984.

Bernard E. Bernstein
Attorney for Respondents
by: Packard Press

APPENDIX

APPENDIX D

Constitutional Provisions

Article III, §1 of the Constitution of the United States.

Judicial power.—The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Statutes

28 U.S.C. §636

Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive

relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to supress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further

evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall

be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the references of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal expeditious and

inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals under petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall determine, taking into account the complexity of the particular matter referred to the magistrate, whether the record in the proceeding shall be taken, pursuant to section 753 of this title, by electronic sound recording means, by a court reporter appointed or employed by the court to take verbatim record by shorthand or by mechanical means, or by an employee of the court designated by the court to take such a verbatim record. Notwithstanding the magistrate's determination, (A) the proceeding shall be taken down by a court reporter if any party so requests, (B) the proceeding shall be recorded by a means other than a court reporter if all parties so agree, and (C) no record of the proceeding shall be made if all parties so agree. Reporters referred to in this paragraph may be transferred for temporary service in any district court of the judicial circuit for reporting proceedings under this subsection, or for other reporting duties in such court.

(d) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall

conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall

perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(As amended Oct. 17, 1968, Pub.L. 90-578, Title I, §101, 82 Stat. 1113; Mar. 1, 1972, Pub.L. 92-239, §§1, 2, 86 Stat. 47; Oct. 21, 1976, Pub.L. 94-577, §1, 90 Stat. 2729; Oct. 28, 1977, Pub.L. 95-144, §2, 91 Stat. 1220; Oct. 10, 1979, Pub.L. 96-82, §2, 93 Stat. 643.)

Rules

Rule 53 of the Federal Rules of Civil Procedure Masters

(a) Appointment and Compensation. The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be

fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate is designated to serve as a master pursuant to Title 28, U.S.C. §636(b)(2). The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the ad-

missibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who

is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Draft Report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) [Application to Magistrate.][1] A magistrate is subject to this rule only when the order referring a matter to the magistrate expressly provides that the reference is made under this Rule.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983.)

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1. Editorially supplied.

APPENDIX E

Response to Defendant's Petition for Attorneys' Fees

October 27, 1982

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. CIV. 3-82-21

BETTY PHILLIPS

Plaintiff

v.

TVA ENGINEERING ASSOCIATION, INC., et al.,

Defendants

RESPONSE TO DEFENDANTS' PETITION FOR ATTORNEYS' FEES

Comes the plaintiff by and through her undersigned attorney and responds to the defendants' Petition for Attorneys' Fees as follows:

1. The Memorandum Order and Judgment in this matter was docketed on October 7, 1982, becoming a Final Order on that date of Federal Rules of Civil Procedure, Rules 58 and 79. See also Federal Rules of Appellant Procedure, Rule 4(a)(6).

An appeal from a Final Order normally ousts the district court of jurisdiction. *Wright v. Jackson*, 522 F.2d 955 (4th Cir. 1975).

Plaintiff filed a timely Notice of Appeal on October 15, 1982, appealing the dismissal of Plaintiff's action as well as the award of Defendants' attorneys' fees. Plaintiff respectfully submits that this Appeal ousts the district court of jurisdiction on this matter, and the question of the proper amount of attorneys' fees should be held in abeyance until such time as the United States Court of Appeals for the Sixth Circuit has ruled on the plaintiff's Appeal.

THIS 27th day of October, 1982.

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Kevin E. March
Attorney for Plaintiff

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